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Supreme Court of the United States

OCTOBER TERM, 1962

No. 1065

HALLIBURTON COMPANY
and
CONTINENTAL CASUALTY COMPANY,
Petitioners

versus

NORTON DRILLING COMPANY
and
LIBERTY MUTUAL INSURANCE COMPANY,
Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners seek certiorari to review the judgment of the Court of Appeals for the Fifth Circuit, affirming dismissal of petitioners' third-party complaint for failure to state a claim upon which relief can be granted; and, in support of their petition, respectfully show:

Opinions Below and Jurisdiction

The District Court rendered no opinion. The original opinion of the Court of Appeals (Judge Rives dissenting) is reported at 302 F2d 431, and its opinion deny-

ing petitioners' application for rehearing *en banc* (Judge Rives again dissenting) is reported at 313 F2d 380. These opinions are printed in the Appendix hereto.

The judgment of the Court of Appeals is dated April 25, 1962, and was entered the same date. Rehearing was denied on January 30, 1963. Jurisdiction of this Court lies under 28 USC 1254(1).

Questions Presented

This is a civil tort action for personal injury. In his complaint, the plaintiff, a maritime worker, asserts that he is a seaman. The defendants (petitioners herein) filed a third-party complaint against the plaintiff's employer seeking indemnity against the plaintiff's claim. One of the grounds asserted for indemnity was that the plaintiff's injury was proximately caused by his employer's primary, active negligence, and any negligence on the original defendants' part was passive only.

Dismissal of the third-party complaint below presents the following questions for decision by this Court:

I

Whether a third-party complaint, seeking non-contractual indemnity from an active tort-feasor against the plaintiff's tort claim, should, as held by the Court of Appeals in this case, be dismissed on motion on the ground that "the pleadings manifest no distinction, in the kind or degree of negligence" asserted by the

plaintiff against the defendant, from that asserted by the defendant against the third-party defendant,

or, to the contrary,

Whether, as held by another panel of the same Court nine months earlier, the viability of such a third-party complaint should not instead be tested with reference, not to what the pleadings say as to the kind and degree of the respective parties' negligence, but to what the evidence may ultimately show in that regard.

II

Whether Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (33 USC 905) forecloses assertion of a third-party indemnity claim by a defendant against the employer of a plaintiff suing as a seaman for personal-injury damages.

As to Question I, the basis for the Fifth Circuit's affirmance of a third-party dismissal on motion in this case—that the viability of a third-party complaint should be tested, on motion to dismiss, by analysis and comparison of the allegations as to negligence contained in the plaintiff's, and in the third-party, complaints—is directly contrary to the holding, by another panel of the same Court nine months earlier, in reversing dismissal of the same type of third-party complaint on motion, that the viability of such a third-party complaint is to be determined with reference

not to the bare averments of the pleadings, but to the fact situations which may be developed on trial. *Travelers Insurance Co. vs Busy Electric Co.*, 294 F2d 139 (1961).[1]

This dichotomy of approach to the question whether a third-party complaint for tort indemnity states a claim for relief, represents not only an intra- but also an inter-Circuit conflict: The construction-of-pleadings basis for decision adopted by the Court of Appeals in this case, is supported by the Tenth Circuit's decision in *Peak Drilling Co. vs Halliburton Oil Well Cementing Co.*, 215 F2d 368 (1954); whereas the await-the-facts basis for decision adopted by the Court in the *Busy Electric* case, is in accord with the Third Circuit's decision in *Gartner vs Lombard Bros.*, 197 F2d 53 (1952).[2]

The construction-of-pleadings approach seems clearly contrary to this Court's holdings that, under the Civil

[1] The Court in this case consisted of Judges Tuttle, Rives and Wisdom. Judge Tuttle wrote the opinion of the Court and Judge Rives dissented. In the earlier case the Court consisted of Judges Cameron, Brown and Wisdom. Judge Brown wrote the opinion of the Court and Judge Cameron dissented on another point. Judge Wisdom concurred in both decisions, but wrote the prevailing opinion in neither.

[2] Reversing dismissal of such a third-party complaint on motion, the Third Circuit pointed out that "if the facts, as developed, could show both Lombard and DuPont to be tort-feasors and both 'primarily' liable, it could well be that the case would be one for contribution . . . . Until we know what the facts are, we cannot possibly know whether the danger of collision in nondirected traffic on these premises was an open danger or not . . . All we know is what we are told in the above paragraph of the third-party complaint. Upon a trial of the facts there may or may not be made out a case whereby DuPont can be compelled to contribute to Lombard." 197 F2d at 55-56.

Rules, a complaint need do no more than set forth a claim and give the respondent fair notice of its basis; that the facts on which the claim is based need not be pleaded; and that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". *Conley vs Gibson*, 355 US 41, 47-48 (1957); *United States vs Employing Plasterers Association*, 347 US 186, 188-89 (1954).[3]

As to Question II, the Court of Appeals held petitioners' indemnity claim foreclosed on the additional ground that "the applicable workmen's compensation statutes have completely abolished an employer's tort liability for injuries to his employees". 302 F2d at 434; Appendix, page 24 below. If the plaintiff is a seaman as he asserts (R 27), this holding is directly contrary to the holding by another panel of the Fifth Circuit that a seaman is not covered by any workmen's compensation law. *Kibadeaux vs Standard Dredging Co.*, 81 F2d 670 (CA 5-1936), cert. den., 299 US 549; see also *Norton vs Warner Co.*, 321 US 565 (1944). If the plaintiff is not a seaman, but a mere maritime worker, this holding by the Court of Appeals herein conflicts with this Court's subsequent intimation that the Longshoremen's and Harbor Workers' Compensation Act does not foreclose a tort indemnity claim against a

[3] The same rules of pleading govern original and third-party complaints. 3 *Moore's Federal Practice* (2d ed.) 417, ¶14.07; *Travelers Insurance Co. vs Busy Electric Co.*, 294 F2d 136 (CA 5-1961); *LaFerry vs Ajax Truck Rentals*, 161 FS 707 (ED Tenn.-1958).

personal injury plaintiff's employer. *Weyerhaeuser S. S. Co. vs United States*, 31 US Law Week 4331 (1963).

Rule and Statute Involved

Rule 14(a), Federal Rules of Civil Procedure: "When Defendant May Bring In Third Party. Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is now or may be liable to him for all or part of the plaintiff's claim against him. . . ."

Section 5, Longshoremen's and Harbor Workers' Compensation Act: "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . ." 33 USC 905; 44 Stat. 1426.

Statement of the Case

Adam J. Sims brought this civil action against petitioners, Halliburton Company and its liability insurer, to recover damages for injuries he sustained while employed by respondent, Norton Drilling Company, aboard its submersible drilling barge. Federal jurisdiction was based on diversity of citizenship. R 2.

Sims's complaint alleges (1) that he is a seaman (R 2), and (2) that the drilling barge was operating in

navigable waters of the United States, when the chain bridle of a cementing head furnished by Halliburton parted, causing him to fall while he was exerting strain with a derrick on the barge in an effort to lift the head. R 3-4.

Liability of petitioners was predicated on the averment that "all of the foregoing proximately resulted from" Halliburton's negligence "with respect to the manufacture, maintenance, upkeep and repair" of the cementing head, and Halliburton's negligent failure "to furnish reasonably proper tools and appliances and to warn the plaintiff . . . of the dangers inherent therein". R 4-5.

Petitioners filed a third-party complaint against Norton, for indemnity against Sims's claim. R 10. The third-party complaint alleges that Norton had undertaken to remove the cementing head with its employees and equipment, and that the accident was proximately caused by Norton's primary, active negligence, and by its violation of its implied warranty to remove the head in a workmanlike manner. R 12.

The non-contract claim of indemnity was based on the familiar principle that if harm results from the negligence of two tortfeasors, the fault of one being active or primary, and the fault of the other being passive, secondary or merely technical, the passive is entitled to indemnity from the active tortfeasor for any resultant damages it may have to pay. *Cf.* Restate-

ment, *Restitution*, Chapter 3, Topic 3; *Washington Gas Light Co. vs. District of Columbia*, 161 US 316 (1896).

Norton and the other respondent (Norton's workmen's compensation insurer, which had intervened for reimbursement out of Sims's recovery, R 6-9) moved to dismiss the third-party complaint for failure to state a claim upon which relief can be granted. R 16.

The District Court granted the motion; and its judgment of dismissal was affirmed by a divided Court of Appeals (Judge Rives dissenting).

On the basis of a stated conflict between the Court of Appeals' decision, and the decision on the same question by another panel of the same Court nine months earlier, petitioners applied for a rehearing *en banc*. This application was denied by the same panel (Judge Rives again dissenting) on January 30, 1963, more than nine months after the original opinion was handed down.

The original opinion of the Court of Appeals was based, as to dismissal of petitioner's non-contract indemnity claim (to which the Court referred as the "active-passive negligence dichotomy"), on the fact that "the pleadings manifest no distinction in the kind or degree of negligence asserted against Halliburton and Norton. Sims, the plaintiff, seeks to hold Halliburton for furnishing defective equipment. Halliburton charges that Norton was negligent in handling this equipment. Both parties, therefore, are charged with

active and affirmative negligence." 302 F2d at 434; Appendix, page 24 below.

The Court's original opinion did not cite the Fifth Circuit's contrary decision rendered on July 17, 1961 (while the Court had this case under advisement) in *Travelers Insurance Co. vs Busy Electric Co.*, 294 F2d 139, although that decision also dealt with the propriety of dismissal on the pleadings of a third-party tort-indemnity complaint, and although petitioners had filed a brief calling the Court's attention to the *Busy Electric* decision and urging it as dispositive of the issues in this case.

Since petitioners' application for a rehearing *en banc* was based on the conflict, in principle and result, between the Fifth Circuit's decisions in this case and in *Busy Electric*, reference was made to the latter decision in the opinion denying the application for rehearing in this case. That opinion (Judge Rives again dissenting) denied the existence of any conflict between the two decisions, on the basis, as to the non-contract indemnity claim, of an asserted distinction between the pleadings in the two cases. But this attempted distinction, in addition to being unreal, emphasizes, instead of reconciling, the conflict in the principles on which the two decisions were based.

The distinction sought to be drawn is simply that in *Busy Electric* the plaintiff charged the defendant with "failing to maintain the aforesaid pole in safe condition, which maintenance was the responsibility of the"

defendant; whereas in this case plaintiff Sims charged Halliburton with negligence "with respect to the manufacture, maintenance, upkeep and repair of the said cementing head and its appurtenances". The opinion denying rehearing construes the *Busy Electric* charge of "failing to maintain", as a charge of "technical or constructive" fault for which the defendant would be entitled to indemnity; but concludes that Sims's charge in this case, of negligence as to "manufacture, maintenance, upkeep and repair" is a charge of active fault for which Halliburton "would have no cause of action over against Norton". 313 F2d at 381; Appendix, page 43 below.

Not only is the postulated distinction no distinction at all, but it underlines the construction-of-pleadings basis of the decision in this case, as contrasted with the contrary await-the-facts basis for the *Busy Electric* decision.

An additional ground for the Court of Appeals' decision herein was the holding "that the applicable workmen's compensation statutes have completely abolished an employer's tort liability for injuries to his employees". 302 F2d at 434; Appendix, page 24 below.

Argument

Question I

The conflict between the decision below, and that of another panel of the same Court only nine months

earlier in *Travelers Insurance Co. vs Busy Electric Co.*, (294 F2d 139), is patent.

This case and the *Busy Electric* case both involve the identical question whether a defendant, sued for recovery of damages for personal injury on the ground of negligence, may implead the plaintiff's employer for indemnity. In both cases, the plaintiff charged the defendant with negligence in the maintenance of equipment (a light pole in *Busy Electric*, a chain in this case) and in both cases, the defendant's third-party complaint charged the employer with negligence in handling the defective equipment. Both third-party complaints were dismissed in the trial court on the basis of the pleadings alone.

The dismissal was reversed in *Busy Electric*, on the ground that a third-party complaint should not be dismissed, regardless of the allegations in the original complaint, if there is any reasonable possibility that facts may be developed at the trial under which the defendants, if cast, might be entitled to indemnity from the employer.

Contrary to that holding in *Busy Electric*, the same Court affirmed dismissal of the impleader in this case, on the ground, not that facts might not be developed at the trial entitling the defendants to indemnity, but that, under the allegations of the plaintiff's complaint, no claim is asserted against the defendants for which the latter, if cast, might be entitled to indemnity from the employer.

The divergence of the Court's approach to the two cases is clearly evident from its opinions. In this case, petitioners' argument that circumstances may be shown at the trial under which the employer, as the active tortfeasor, would owe indemnity to the defendants guilty of only passive negligence, was dismissed for the reason that "*the pleadings* manifest no distinction in the kind or degree of negligence *asserted against*" the defendants and the employer. 302 F2d at 434; Appendix, page 24, below. (Emphasis supplied.)

But in *Busy Electric*, the Court rejected an approach based on the allegations of the pleadings: "Busy Electric (the third-party defendant) apparently persuaded the Court to read the pleadings as though that was all there was to the case. Of course, as we have so many times pointed out, this is not the test. . . . 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" 294 F2d at 143.

In its opinion in this case, the Court goes on to state that "Sims, the plaintiff, seeks to hold Halliburton for furnishing defective equipment. Halliburton charges that Norton was negligent in handling the equipment. Both parties, therefore, are charged with active and affirmative negligence", so that, under the pleadings, Norton could owe no indemnity, as the

active tortfeasor, to a merely passively negligent Halliburton. 302 F2d at 434; Appendix, page 24 below.

But in *Busy Electric* the Court said: "Busy Electric . . . overcomes this by again emphasizing the literal words of Schomaker's complaint which charges negligence of HANO 'through their agents or employees, in failing to maintain the * * * pole in safe condition * * *.' This, it asserts, demonstrates positively that the plaintiff's demand is not, as in Appalachian, based upon constructive or technical fault. But until the facts are established, how do we know whether this amounts to 'affirmative' or 'active' fault or, as contended by HANO, merely the assertion of a liability based on the landowner's pervasive duty to keep the premises in good repair?" 294 F2d at 145.

The conflict between the two panels of the Fifth Circuit is underlined by the attempted reconciliation of the decisions, in the opinion denying rehearing in this case. The unreal distinction which that opinion seeks to draw between the charge of "passive" negligence in "failing to maintain" in *Busy Electric*, and the charge of "active" negligence "with respect to the manufacture, maintenance, upkeep and repair" in this case, succeeds only in emphasizing the sterile construction-of-pleadings basis for the decision in this case, as contrasted with the preferable fact basis for the *Busy Electric* holding.

Such an intra-Circuit conflict, especially when it mirrors an inter-Circuit conflict as this one does,[4] calls for resolution through this Court's certiorari power when the question at issue is important. *Dickinson vs Petroleum Conversion Corp.*, 338 US 507 (1950); *John Hancock Ins. Co vs Bartels*, 308 US 180 (1939).

The present intra-Circuit conflict between decisions handed down only nine months apart, leaves all of the District Judges in the Fifth Circuit without guidance as to the standards on which motions to dismiss third-party tort-indemnity complaints are to be decided. Given the complex inter-relations of the modern industrial world, hardly any tort claims now result solely from the act of a single entity, and hardly any tort suits can be decided with reference to the liability of a single tort-feasor. Almost every such suit involves indemnity or contribution claims by the original defendant against a supplier, manufacturer, owner, custodian, operator or other person having some measure of responsibility for the equipment or situs giving rise to the injury.[5] Tort

[4] Compare *Peak Drilling Co. vs Halliburton Oil Well Cementing Co.*, 215 F2d 368 (CA 10-1954), in which, as in this case, a third-party tort-indemnity complaint was dismissed on the ground that the negligence alleged against the defendant was not of a type for which the latter would be entitled to indemnity, with *Gartner vs Lombard Bros.*, 197 F2d 53, 55 (CA 3-1952), which reversed dismissal of such a third-party complaint on motion, on the ground, as in *Busy Electric*, that the viability of the third-party claim could be determined only when "we know what the facts are".

[5] The volume and significance of this branch of litigation would seem to be sufficiently demonstrated by the fact that in the limited sphere of the shoreworker-shipowner-contractor relationship alone, this Court has had occasion, in recent years, to decide important third-party tort-indemnity questions in *Waterman Co. vs Dugan & McNamara*, 364 US 421 (1960), *Crumedy vs The J. H. Fisser*, 358 US 423 (1959).

actions account for almost half of the private litigation in the Federal Courts.[6]

Further, by going counter to this Court's repeated holding that a complaint is not to be dismissed on motion on the basis of the allegations contained therein (the purpose of which is merely to give notice of the type and basis of the plaintiff's claim, not to set forth facts or theories constituting a cause of action[7]), but only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief",[8] the judgment below visits substantial injustice on petitioners, and disrupts the orderly process of the Federal judicial system.

At worst, the judgment below may have *res judicata* effects depriving the petitioners, solely on the basis of

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Weyerhaeuser S. S. Co. vs Nacirema Co., 355 US 563 (1958), *Ryan Co. vs Pan-Atlantic Corp.*, 350 US 124 (1956), *Halcyon Lines vs Haenn Ship Corp.*, 342 US 282 (1952), and *American Stevedores vs Porello*, 330 US 446 (1947).

[6] Administrative Office of the United States Courts, Annual Report of the Director (1962), Table C3.

[7] *Dioguardi vs Durning*, 139 F2d 774 (CA 2-1944). "We have repeatedly said that under the Federal rules . . . a complaint may not be dismissed under Rule 12(b)(6) for a failure to state a claim upon which relief can be granted if under any theory of recovery a case for relief can be made out by the proof." *Mannings vs Board of Public Instruction*, 277 F2d 370, 372 (CA 5-1960).

[8] *Conley vs Gibson*, 355 US 41, 45-46 (1957); *United States vs Employing Plasterers Association*, 347 US 186 (1954). "'Under the Rules of Civil Procedure a case consists not in the pleadings but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings.'" *Des Isles vs Evans*, 200 F2d 614, 616 (CA 5-1952). "Litigation is not an art in writing nice pleadings. It can and should seldom be settled on its merits at the pleading stage unless the parties are agreed upon the facts. . . . In the federal courts very few *contested cases* are settled on the pleadings." 2 *Moore's Federal Practice* (2d ed.) 1611, ¶8.02.

the plaintiff's allegations over which they have no control," of the entirety of any indemnity rights to which the facts may ultimately show them to be entitled against the respondents. *Cf. Nagler vs Admiral Corporation*, 248 F2d 319, 322 (CA 2-1957).

At best, the petitioners will be relegated to the expense and delay of an independent indemnity action against the respondents after this action has terminated, burdening the already-overburdened judiciary and public fisc with the unnecessary expense and loss of time attendant on two trials where one would suffice, subjecting all concerned to the risk of inconsistent fact findings in the two cases, and defeating the whole purpose of the third-party procedure which is "to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant". 3 *Moore's Federal Practice* 412, ¶14.04.

And, as noted above, these unsuitable results are reached, not even on the basis of the petitioners' own pleading, but on the basis of the plaintiff's conclusionary

[9] "Appellant's claim based on the active-passive negligence dichotomy is clearly without merit. For one thing, the *pleadings* manifest no distinction in the kind or degree of negligence *asserted* against Halliburton and Norton. *Sims, the plaintiff, seeks to hold Halliburton for furnishing defective equipment.* Halliburton charges that Norton was negligent in handling this equipment. Both parties, therefore, are *charged* with active and affirmative negligence." 302 F2d at 434; Appendix, page 24 below. (Emphasis supplied.)

allegations for which the petitioners have no responsibility and by which not even the plaintiff himself will be bound on trial.[10]

Nor can respondents contend that the alternative to denial of their motion to dismiss, will be their subjection to the expense of participation in a trial with which they have nothing to do. If, under the undisputed facts, the respondents have no liability to petitioners, respondents are free to develop and present the facts by discovery or affidavits, and obtain dismissal of the third-party complaint by summary judgment. *United States vs Employing Plasterers Association*, 347 US 186, 189 (1954). But if there is a genuine fact issue as to respondents' liability to petitioners, it should be determined by trial, not by attempted exegesis of conclusionary allegations in another party's notice pleadings.

Question II

The alternative basis for the Court of Appeals' decision—the holding that "the applicable workmen's compensation statutes have completely abolished an employer's tort liability for injuries to his employees" (302 F2d at 434; Appendix, page 24 below)—runs directly counter to the holding, by another panel of the same Court, that a seaman (as the plaintiff alleges himself to be, R 2) is not covered by any workmen's compensation law. *Kibadeaux vs Standard Dredging Co.*, 81

[10] See 6 *Moore's Federal Practice* (2d ed.), ¶54.62. "After trial judgment must be given according to the right of the case, whether the correct legal theory has been presented or not, Rules 15(b) and 54(c)". *Atwater vs North American Coal Corp.*, 111 F2d 125, 126 (CA 2-1940), Clark, J., concurring.

F2d 670 (CA 5-1936), cert. den., 299 US 549; and see *Norton vs Warner Co.*, 321 US 565 (1944).

If the plaintiff is a maritime worker rather than a seaman, then the Court of Appeals' holding conflicts with this Court's plain intimation (subsequent to the Court of Appeals' disposition of this case) that the applicable Longshoremen's and Harbor Workers' Compensation Act does not abolish an employer's tort indemnity liability to a third person sued for personal injuries to an employee caused by the employer's primary fault. *Weyerhaeuser S. S. Co. vs United States*, 31 US Law Week 4331 (1963).

Conclusion

It is respectfully submitted that, in the interest of justice, this Court should resolve the confusion-engendering intra- and inter-Circuit conflicts at issue, establish with finality the standards by which third-party tort-indemnity complaints are to be tested, and obviate the unjust and disruptive result reached below, by granting certiorari herein, with either remand to the Court of Appeals for a rehearing *en banc*[11] or direct reversal of the judgment below either summarily[12] or after plenary hearing.

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[11] *Cf. United States vs Johnston*, 316 US 649 (1941).

[12] In other cases, this Court has disposed of questions of pleading and practice by grant of certiorari and summary reversal. *Jung vs K. & D. Mining Co.*, 356 US 335 (1958); *United States vs Arizona*, 346 US 907 (1953); *Ewing vs Gardner*, 341 US 321 (1951).

ORIGINAL OPINION OF THE COURT OF APPEALS

Before TUTTLE, Chief Judge, RIVES and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from the dismissal of the appellants' third-party complaint wherein the appellants asserted a right to be indemnified by the appellee, the employer of the injured plaintiff, for any damages which might be recovered by the plaintiff from the appellants. We affirm the judgment below.

In February, 1960, the appellee Norton, a drilling contractor, was engaged in drilling for oil in Lake Barre, in Terrebonne Parish, Louisiana. It was conducting the drilling operations from its submersible drilling barge. The plaintiff, Adam J. Sims, was employed by Norton as a member of the drilling crew of the barge.

On the morning of February 14, 1960, the appellant Halliburton, an oil well servicing concern, ran cemented casing into the well being drilled by Norton and furnished and installed what is referred to as a "cementing head" on top of the casing. This cementing head was a round, bone-shaped metallic object, weighing from 500 to 750 pounds. To facilitate the lifting of the cementing head off the casing when the casing was sufficiently hardened, there was attached to the top of the cementing head a metal link-type chain.

On the afternoon of February 14, 1960, Sims and others in Norton's crew were directed to remove the cementing head from the casing. They apparently followed cus-

tomary procedure by attaching a "catline" running from the barge's hoisting device to the chain on the cementing head. As the hoist started to lift the cementing head off the casing, the metal chain on the cementing head parted, causing Sims to become entangled in the catline and to fall from the place where he had been working to the drilling floor deck of the barge some 35 feet below. As a result, Sims sustained severe injuries.

Sims brought suit for damages against Halliburton and its liability insurance carrier, the appellant Continental Casualty Company, alleging that his injuries were caused by:

> ". . . the negligence, carelessness and inattention of the defendant, Halliburton Co., its agents, servants and employees, and each of them, with respect to the manufacture, maintenance, upkeep and repair of the said cementing head and its appurtenances, particularly, but not exclusively the said handling chain of the said cementing head, as well as the negligent failure of the said defendant to furnish reasonably proper tools and appliances and to warn the plaintiff and others in his position of the dangers inherent therein."

The action was brought under the general maritime law, Lake Barre being a navigable waterway of the United States, and under the Louisiana Direct Action Statute. The appellee Liberty Mutual Insurance Company, Norton's workmen's compensation carrier, intervened on the ground that it was subrogated to the rights of Sims for payments made under the applicable workmen's compensation statute.

tween joint tortfeasors, an action not recognized under maritime law in personal injury cases. None of the parties having offered supporting affidavits, the motion to dismiss was granted on the pleadings alone.

The appellants pitch their case on two alternative theories. First, they claim that Norton is obliged to indemnify because Norton was "actively" or "primarily" negligent whereas Halliburton was merely guilty of "passive" or "secondary" negligence. Second, they assert that the obligation to indemnify arose from Norton's breach of a contractual warranty to perform its services in a careful and workmanlike manner.

Appellant's claim based on the active-passive negligence dichotomy is clearly without merit. For one thing, the pleadings manifest no distinction in the kind or degree of negligence asserted against Halliburton and Norton. Sims, the plaintiff, seeks to hold Halliburton for furnishing defective equipment. Halliburton charges that Norton was negligent in handling this equipment. Both parties, therefore, are charged with active and affirmative negligence. See *Peake Drilling Company v. Halliburton Company*, 10 Cir., 215 F. 2d 368. Furthermore, even if we were to agree with Halliburton that its fault was only passive or secondary, there is a serious doubt that this alone would be a sufficient ground for imposing an obligation to indemnify upon Norton, in view of the fact that the applicable workmen's compensation statutes have completely abolished an employer's *tort* liability for injuries to his employees. See *Brown v. American-Hawaiian S.S. Company*, 3 Cir., 211 F. 2d

16 (Longshoremans Act); *Michle v. Henriette Wilhemina Schulte*, N.D. Cal., 188 F. Supp. 77 (Longshoremans Act); *McClintic-Marshall Co. v. O'Leary*, 147 La. 85, 84 So. 503 (Louisiana Workmen's Compensation Law).

The implied warranty claim is equally unavailing. In this regard, the appellants rest their hopes on *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, and the cases following in its wake. *Ryan* involved a claim for indemnity by a shipowner against a stevedoring company. An employee of the stevedoring company had been injured due to the improper stowage of cargo by the company. The employee brought suit against the shipowner based on the latter's absolute liability for injuries caused by the vessel's unseaworthy condition. The shipowner thereupon sought to hold the stevedoring company for any damages which the plaintiff-employee might recover. The Supreme Court allowed the claim for indemnity on the theory that the stevedoring company had contracted with the shipowner to perform its services in a careful and workmanlike manner, and that this constituted an agreement to indemnify the shipowner for any losses attributable to the company's failure to so perform. In a later case, *Crumady v. J. H. Fisser*, 358 U. S. 432, the Supreme Court extended the holding of *Ryan* to a situation where the unseaworthy condition had been created by the shipowner rather than the stevedoring company, but where the latter's negligence "brought the unseaworthiness of the vessel into play," thereby causing injury to the plaintiff-employee and exposing the shipowner to liability.

The initial defect in the appellants' claim based on the theory of implied warranty is that the pleadings are completely devoid of any indication that Norton promised Halliburton that it would remove the cementing head in a careful and workmanlike manner. In other words, the pleadings do not show that there was a contract between Norton and Halliburton, and, in the absence of a contractual relationship, there is no basis for a claim of contract indemnity. The third-party complaint states simply that Norton breached an implied contractual warranty to remove the cementing head in a careful and workmanlike manner. This is a naked conclusion of law, unsupported by the factual allegations of the complaint, and which need be given no weight in determining the sufficiency of the complaint. *Mickle v. The Henriette Wilhelmine Schulte, supra,* at page 80.

Indeed, that there was no contract between Norton and Halliburton is demonstrated by the assertion in Halliburton's own brief that Norton's obligation to indemnify arose under "*its* [i.e. Norton's] drilling contract" with the owner of the well. It seems clear, therefore, that Halliburton and Norton were both merely independent contractors of the owner of the well and that there was no contract between them which would obligate Norton to make indemnity in the instant case. See *Peake Drilling Company v. Halliburton Company, supra.*

But Halliburton then says that it is entitled to indemnity as a third party beneficiary of Norton's promise to the owner of the well that it would perform its drilling services in a careful and workmanlike manner. In sup-

port of this proposition. Halliburton points to *Crumady v. The J. H. Fisser, supra*, where the shipowner was allowed to recover from the stevedoring company even though the company had contracted with a charterer of the vessel rather than with the shipowner itself. That decision was based on the theory that:

> "The warranty [of workmanlike service] which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes the rights of third-party beneficiaries." Crumady v. The J. H. Fisser Co., supra, at 428.

Unless we are to say that a drilling contractor's promise to perform in a careful and workmanlike manner inures to the benefit of the "well" itself and thence to all suppliers of equipment to the well, it is apparent that appellants' third-party beneficiary claim must fail. We are not inclined to expand the third-party beneficiary concept to the limits suggested by the appellants. It stretches credulity to imagine that Norton's promise to the owner of the well was intended to benefit each and every supplier of equipment to the well. While there is some logic in holding that a stevedore's warranty is meant to benefit the owner of the vessel, it would take the most artificial and tortuous reasoning to permit application of the third-party beneficiary theory to the facts of the instant case. We, therefore, reject the appellants' contention on this point.

Although we need not go so far in affirming the judgment below, it would not be inappropriate to discuss briefly a perhaps more fundamental reason supporting dismissal of the third-party complaint. We have assumed up to here that the third-party complaint could have withstood an attack on its sufficiency if the pleadings had manifested the existence of a warranty of workmanlike service running from Norton to Halliburton. We might note at this point, however, that the validity of this proposition is open to serious question. As indicated previously, the appellants' claim in this regard is bottomed on the stevedore-shipowner cases wherein it has been held that a shipowner is entitled to indemnity from a stevedoring company if the negligence of the stevedoring company "brings into play" an unseaworthy condition which has its origin in some act or omission on the part of the shipowner. These decisions represent somewhat of a departure from the general rule that a contract will not be construed to provide for indemnification of the indemnitee for losses due to his own neglect, unless the intention to do so is expressed in unequivocal terms. 27 Am. Jur. Indemnity, Section 15. Cf. *Jacksonville Terminal Co. v. Railway Express Agency*, 5 Cir., 296 F. 2d 256. The reason for this exception to the general rule is explained in a recent opinion by Judge Mathes in *Hugev v. Dampskisaktieselskabet International*, S.D. Cal., 170 F. Supp. 601 at 609-610:

> "The stevedoring agreement is a maritime contract . . . . , so any obligations to be implied as in fact arising from the contract should take cognizance of the maritime considerations involved. Ships, as well as seamen and long-

shoremen, are subject to the 'hazards of maritime service.' Ships still break up at sea. Even though the ships of today may not be as vulnerable, the typhoons of our day are 'as formidable and swift' as when Conrad wrote. The Pacific Coast is as treacherous now as it was some two generations ago when the Nottingham was battered into a hulk off the Oregon coast. The Nottingham, 9 Cir., 1916, 23 F. 618.

"In almost every instance, when a stevedoring contractor commences the work of loading or unloading a seagoing vessel, the ship has arrived in port only a few hours before. She may have been at sea for weeks or months. Almost always, she has ridden some heavy seas. Often she may have rolled and pitched through mountainous seas for days, taking thousands of tons of water over her decks, sailed through freezing and tropical weather, and been beaten by 100 mile an hour gales. Almost surely she will have been serviced by stevedores of varying degrees of competency in other parts throughout the world.

"Being a mass of plates, pipes, wires, beams and various mechanisms, each to some degree vulnerable to the elements, it would be too much to expect a cargo vessel to arrive in port with all equipment, appliances and facilities in a fully seaworthy condition. Especially is this true with respect to the hatches, booms and winches, which are relatively more likely to be in disorder because of the elements, and the abuse and misuse of men as well. It is reasonable to expect, then, that many things may be wrong with a freighter and her equipment and

appliances when she arrives in port; that she may well be a place of danger even as she docks. And all of t' e lurking dangers may be due entirely to .e hazards of the ship's service.

"The stevedoring contractor knows that the ship has been at sea; that she may be in many respects dangerous to the life and limb of an unskilled person; that if a condition is found which is unsafe for the professional longshoreman, as a rule the contractor can remedy it at the expense of the shipowner; that if the stevedoring operations are thereby delayed, the shipowner normally must pa: for standby time.

"Stevedoring contractors hold themselves out as being trained and equipped to cope with these conditions and these dangers. To this end, the stevedoring contractor is usually given full use and charge of the ship's loading and unloading equipment and appliances and the cargo hatches and holds. So it is that the stevedoring contractor cannot reasonably expect, and does not expect, to board a vessel which in all respects, as to equipment and appliances as well as hull, is in a seaworthy condition, or even in a reasonably safe condition. Hence it is not reasonable to infer that the shipowner, in executing the stevedoring contract, impliedly covenants that the condition of the ship or of her equipment or appliances will exceed the stevedoring contractor's reasonable expectations."

It is apparent that none of the considerations discussed by Judge Mathes are present in the instant case. Certainly, a drilling contractor has no reason to expect

that equipment furnished by a supplier to the well may be so defective as to be dangerous to life and limb. Consequently, it is highly unreasonable to assume that a drilling contractor, merely by agreeing to perform its services in a careful and workmanlike manner, intends to immunize the supplier of defective equipment from liability for any losses attributable in whole or in part to such defect. Thus, even if Norton did promise Halliburton, either directly or indirectly, that it would remove the cementing head with reasonable care, we would have difficulty construing this as a promise to indemnify Halliburton for losses traceable directly to a defect in the cementing head, for which defect Halliburton alone would be responsible.

One final point: Halliburton also contends that it is entitled to indemnity under the law of Louisiana. Apart from the fact that federal maritime law is controlling here, see *Koninklyke Nederlandsche Stoomboot Maatschappy, N.V., Royal Netherlands Steamship Company v. Strachan Shipping Co.*, 5 Cir., March 30, 1962, ...F. 2d..... and *Offshore Co. v. Robinson*, 5 Cir., 1959, 266 F. 2d 769, we might also state that the same result we have reached would follow if the law of Louisiana were applied. See *United Gas Corporation v. Guillory*, 5 Cir., 1953, 206 F. 2d 40.

Of course, we recognize that a complaint cannot ordinarily be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 335 U. S. 41, 45-46,

We think this rule was satisfied in the instant case, and that the District Court was, therefore, correct in dismissing the third-party complaint.

The judgment is

AFFIRMED.

DISSENTING OPINION

RIVES, Circuit Judge, dissenting:

This appeal is from the dismissal of a third-party complaint on the basis of the pleadings alone. The third-party complaint was filed in accordance with Rule 14(a) of the Federal Rules of Civil Procedure, which allows the defendant in an action to file such a complaint "upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." Under the Rule, the court has discretion to determine whether it will allow the third-party complaint to be filed; but having been allowed, the complaint becomes subject to the general rules of pleading. By its own terms, Rule 14 provides that defenses, cross-claims, and counterclaims must be filed in accordance with Rules 12 and 13. Under the definition of Rule 7, a third-party complaint, like an original complaint, is a pleading whose form is prescribed by Rule 8. It would therefore appear that a third-party complaint is subject to the same liberal rules of construction as an original complaint. A liberal construction is also dictated by the purpose of Rule 14 itself—to do away with circuity of action. 3 Moore, Federal Practice, p. 412, §14.04, p. 417, §14.07. See also *Jones*

v. Waterman S.S. Co., 3 Cir., 1946, 155 F. 2d 992, 997; *Nora v. Pittston Stevedoring Co.*, E.D. N.Y., 1950, 90 F. Supp. 35, 36. In *Travelers Ins. Co. v. Busy Electric Co.*, 5 Cir., 1961, 294 F. 2d 139, 143, this Court applied to a third-party complaint the test stated in *Conley v. Gibson*, 1957, 335 U. S. 41, 45-46:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

We have often approved the wise statement of Judge Sibley for this Court in *DeLoach v. Crowley's, Inc.*, 5 Cir., 1942, 128 F. 2d 378, 380:

> "Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings."

See also *Des Isles v. Evans*, 5 Cir., 1952, 200 F. 2d 614, 616.

It is especially important in this case that the issues be decided upon the proofs and not the pleadings because of the difficult nature of the legal issues involved. Otherwise, we may find ourselves exploring theories of liability and deciding legal questions which would prove to be abstract and nonexistent under the facts of the case as revealed by the evidence.

Halliburton has alleged that Norton breached its contractual warranty of workmanlike services by the manner in which it removed the cementing head. In a somewhat similar situation where a shipowner has been subject to a personal injury suit due to the failure of a stevedoring company to perform its duties in a workmanlike fashion, the Supreme Court has implied such a warranty in the stevedoring contract and allowed recovery against the stevedore. See *Ryan Co. v. Pan-Atlantic Corp.*, 1956, 350 U. S. 124; *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 1958, 355 U. S. 563; *Crumady v. The J. H. Fisser*, 1959, 358 U. S. 432. To date, this rule has not been widely extended beyond the stevedore-shipowner relationship. It is, however, open to the third-party plaintiff to show, if he can, that there is a similar need for a federal maritime rule to govern the offshore gas and oil contracts here in question. *Cf. Wilburn Boat Co. v. Fireman's Ins. Co.*, 1955, 348 U. S. 310. Also in issue is the nature of the contracts involved. It does not appear from the pleadings whether there is a direct contractual relationship between Halliburton and Norton, or whether they have each contracted through a third party, the well owner. Looking to the pleadings as a whole, the original complaint of the injured workman alleges that "Halliburton Company had furnished certain equipment to the Plaintiff's said employer," Norton. The third-party complaint then alleges breach of an implied contractual warranty. Under these allegations, I think it is open to Halliburton to show a direct contract with Norton. Or, in the alternative, it may be able to show that it is a third-party beneficiary on Norton's contract with the well owner. See *Waterman*

Steamship Corp. v. Dugan & McNamara, Inc., 1960, 364 U. S. 421.

Perhaps the leading case allowing indemnity against an employer who had protected himself with workmen's compensation is *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, N. Y., 1938, 15 N. E. 2d 567. In that case an independent contractor had been hired to make certain repairs and in the process of performing his services ruptured a gas line. Before the escaping gas was discovered, an employee of the contractor was overcome. His widow recovered from the landowner, who then sued for indemnity from the contractor on the ground that he had breached an independent duty or obligation in the performance of his services; the contractor pleaded the exclusive remedy clause of the New York Workmen's Compensation law, from which the Longshoremen's Act and many other state compensation acts were derived. The court reversed the lower court's denial of the indemnity, holding that "an independent duty or obligation owed by the employer to the third party is a sufficient basis for the action." 15 N. E. 2d at 569. This doctrine, however, got little real support until the Supreme Court's decision in *Ryan Co. v. Pan-Atlantic Corp., supra*, where the Court found that a similar independent obligation to perform services in a workmanlike fashion was "the essence of petitioner's stevedoring contract" and found an implied contractual warranty. When the situation arose where the shipowner and stevedore were not tied directly by con-

tractual relations, the Court had no trouble in allowing the shipowner to recover as a third-party beneficiary on the stevedore's contract with the shipping agent. *Crumady v. The J. H. Fisser, supra.*

The *Ryan* doctrine did not come limited to the stevedoring situation, however. As already pointed out, it had been the law of New York for some time in the service contract area. After *Ryan*, a number of other state and federal courts have extended the theory of the doctrine, and the rationale of recovery. In the recent case of *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co.*, Mo. 1959, 323 S. W. 2d 788, the employee of a contractor hired to paint the third party's plant was injured by high tension wires and sued to recover from the third party. The third party brought in the contractor on the ground that the contractor had breached its duty of performance since it had been warned of the open wires. The court found that the facts alleged in the pleadings established a common-law right of indemnity on the basis of active/passive negligence. It then turned to the typical exclusive remedy clause of the Missouri compensation act and, citing *Ryan*, concluded that facts which support a common-law indemnity would also support an implied contractual warranty not barred by the act. In a similar fashion in *American President Lines v. Marine Terminals Corp.*, 234 F.2d 753 (9th Cir., 1956), cited with approval in *Weyerhaeuser S.S. Co. v. Nacirema Co., supra*, the court determined that the facts supported a common-law indemnity for active/passive negligence and then shifted to *Ryan* and the implied

contractual warranty to avoid the exclusive remedy clause of the Longshoremen's Act. Other courts, while not using the contractual warranty language have come to the same result. In *American District Tel. Co. v. Kittleson*, 8 Cir., 1950, 179 F. 2d 946, the court held that proof of a common-law indemnity on the basis of active passive negligence was not barred by the exclusive remedy clause of the Iowa compensation act on the ground that, as in *Westchester, supra*, the facts indicated breach of "an independent duty owed by the employer to the third party." If this were a post-1956 decision, the court could as easily have called it a breach of an implied contractual warranty. In *General Electric Co. v. Moretz*, 4 Cir., 1959, 270 F. 2d 780, the shipper, in spite of the Tennessee compensation act, was allowed an indemnity over against the carrier for a personal-injury recovery by the carrier's truck driver, because ICC regulations made the carrier responsible for the proper loading of the truck and the bills of lading agreed to hold the shipper harmless for damage inflicted on the cargo. In that case, the "independent duty" was based on these promises and regulations and an indemnity was allowed even though the shipper had himself loaded the truck and breached his duty under other ICC regulations to load it properly. In *Burris v. American Chicle Co.*, 2 Cir., 1941, 120 F. 2d 218, the independent duty was based on state law.

Turning to the present case, the majority has held on the pleadings that the appellants could prove no "independent duty" owed by Norton to Halliburton

either directly or as third-party beneficiary. The majority is of the opinion that "it would take the most artificial and tortuous reasoning" to conclude that under any set of facts the driller might have obligated himself for the benefit of third-party suppliers to handle their equipment in a proper workmanlike fashion. It is at this point that we disagree.

To distinguish the stevedore case, the majority stresses the unique circumstances of his relation to the shipowner, such as his expertise, his special competence to handle equipment which has undergone the rigors of the sea, and his warranty to guard against the unforeseen. Upon reflection, however, the driller on an oil barge is not in a far different situation. A driller is in a hazardous business under any circumstances; since he handles unusually complex equipment and a highly volatile material, the likelihood of accidents and extraordinary damage is great. Upon a drilling barge, the small working space accentuates these factors, and added to them are the corrosive maritime factors of the sea and open weather. The driller's special situation is further emphasized by the fact that he is in control of the drilling barge, drilling equipment, and all the operations connected with the creation of a producing well. Under his general control a whole stream of independent contractors bring on special equipment and carry out specialized operations, such as the cementing of the well. Many of these operations, as in this case, are then turned over to the driller for completion and the equipment put in his control. While in his control it is subject to all

the normal drilling hazards plus the added maritime factors mentioned above, factors which are part of the driller's specialized knowledge. Under such circumstances, sloppy performance, insufficient precautions, failure to guard against the effect of maritime factors on equipment most probably designed for shore use, can not only enhance the possibility of serious injury, but open the supplier of special equipment to liability he may not have been able to foresee. Equipment, which was otherwise of sound construction, may prove "defective" under the unusual stresses present on a drilling barge; it may prove "defective" if negligently handled; it may actually be defective under any circumstances, but so obviously so that the most amateur driller should have noticed. Added to this is the fact that the supplier is no longer present and able to control the further handling of the equipment or even observe how it is handled—he has entrusted it to the care and expertise of the driller. Under such circumstances would it be "most artificial and tortuous" to reason that the driller warrants to the independent contractors that he will exercise the care that is to be expected of an expert who offers specialized services under very hazardous circumstances. I am unable to say that there might not arise under such circumstances an independent duty between the driller and the supplier either directly or as third-party beneficiary that the driller will carry out his services in a workmanlike manner.

The majority stresses that to supply defective equipment under any circumstances is such an act of af-

firmative negligence that it could never be the "passive, technical, or constructive" negligence which would justify the shifting of liability. I would only point out that such affirmative acts are present in many cases, and the courts have decided that the balancing of such factors is for the jury. In *Weyerhaeuser, supra,* the shipowner, against all customary practice and good judgment, had allowed temporary winch shelters to go to sea and then turned them over to the stevedore. In *Crumady, supra,* the shipowner had set the governor on the loading boom at twice the recommended safe load. In *Moretz, supra,* the shipper himself had negligently loaded the truck. But in each case the Court ruled that it was for the jury to weigh this failure against the primary warranty of the injured party's employer. Or, as suggested above, the defect may only appear because of unusual hazards which are primarily in the specialized sphere of the warrantor.

The foregoing long and discursive statement of possible situations which would entitle the third-party plaintiffs to relief is justified only because the majority declines to follow the rule generally applicable to the effect that the case should be tried on the proofs rather than the pleadings.

I respectfully dissent.

OPINION OF THE COURT OF APPEALS ON DENIAL OF PETITION FOR REHEARING

Before TUTTLE, Chief Judge, RIVES and WISDOM, Circuit Judges.

PER CURIAM: The petition for rehearing en banc is hereby DENIED. The petition is based principally on the basis that the judgment of this Court is in conflict with our prior judgment in *Travelers Insurance Company v. Busy Electric Company*, 5 Cir., 294 F. 2d 139. We conclude that there is no conflict in the decisions, principally because in the Busy Electric Company case it was alleged by the third-party plaintiff, the defendant in the original suit, that the third-party defendant had executed a contract of indemnity to the third-party plaintiff. No such contract is alleged in the present suit. However, since the Court in its opinion in the Busy Electric Company case discussed the third-party complaint there in light of the Louisiana jurisprudence dealing with the right of contribution between two tort feasors, we must next look to see whether the facts alleged in this third-party complaint are such as to bring it within the ambit of our decision in the Busy Electric Company case that the complaint could not be dismissed on motion for summary judgment.

We find the Louisiana jurisprudence as to contribution between tort feasors expressed in *Appalachian Corporation v. Brooklyn Cooperage Company*, 91 So. 539, particularly at page 541. That is, that when a party is sued as a defendant and the basis of the action against him

is that he is "only technically or constructively at fault, from failure or omission to perform some legal duty" he may seek indemnity against a party whose conduct amounts to active negligence. In describing the nature of the liability which it speaks of as technical or constructive fault, the opinion in Appalachian describes it as such conduct that the party could not "in law or morals be said to be a culpable participant in the act of negligence." This Court found that the original complaint in Busy Electric Company made a charge of liability against the Housing Authority of New Orleans of "technical or constructive" fault, the allegations actually being that the plaintiff was injured from the fall of an electric light pole because of HANO's "failing to maintain the aforesaid pole in safe condition, which maintenance was the responsibility of the said Housing Authority." In contrast to this "technical or constructive" fault charged against the original defendant in Busy Electric, the defendant, then, as the third-party plaintiff alleged that the act of negligence of the employer, Busy Electric Company, was the cause of the injury to the plaintiff. Thus, Busy Electric Company was ruled by Appalachian, for in each of those cases the original defendants sued the employer of the injured person alleging the injury was due to the affirmative acts of negligence by the employer in handling the equipment.

The distinction here is that the original suit against Halliburton did not charge "technical or constructive fault"; it charged that the defendant was guilty of negligence "with respect to the manufacture, mainte-

nance, upkeep and repair of the said cementing head and its appurtenances." Thus, the general rule of no contribution between tort feasors until after a judgment against both has been paid by one under the Louisiana jurisprudence applies. See *Kahn v. Urania Lumber Company*, 103 So. 2d 476, of which this Court, in the Busy Electric Company case, said, "Nor do we question at this stage the binding effect of Kahn as the latest and most authoritative expression of the Louisiana courts under Erie." 29[illegible] 2d 139, 149.

We conclude that if the original plaintiff recovers on this complaint against Halliburton Company, the latter would have no cause of action over against Norton under the principle stated in the Appalachian case. Therefore, no third-party complaint is warranted because no matter what proof were tendered in such third party action, the third-party complainant may not be permitted to recover. Under these circumstances a summary judgment dismissing the third-party complaint is proper.

RIVES, Circuit Judge, Dissenting.

JUDGMENT OF THE COURT OF APPEALS

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellants, Halliburton Company and Continental Casualty Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the District Court.

"RIVES, Circuit Judge, Dissenting."

April 25, 1962